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# 'Duty To Negotiate In Good Faith' Claim Defeated; 'SIGA' Reach Is Narrowed

**By Jacqueline G. Veit, Elizabeth C. Conway and Kelsey J. Davis**

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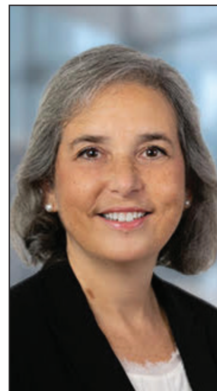
Corporate attorneys and clients will be relieved to learn of a federal jury verdict and judge's decision that, together, limit the potential reach of the "duty to negotiate in good faith" that can arise during the early phase of a potential transaction from just a term sheet or letter of intent (LOI).

In sum, parties can now have more confidence that "nonbinding" actually means nonbinding, and even if such a "duty" exists in an LOI, that the damages will be limited, discouraging counterparties from weaponizing this claim to get a windfall.

On Aug. 15, a U.S. District Court for the Southern District of New York jury issued a defense verdict on a "duty to negotiate in good faith" claim arising from a non-binding LOI, finding no such duty existed in the LOI at all. This followed the court's summary judgment decision, which reduced the $30 million claim to approximately $400,000, finding "expectation damages" were not recoverable.

Ten years after a controversial Delaware decision on this duty, *SIGA Technologies v. PharmAthene*, 67 A.3d 330 (Del. 2013) (*SIGA*), the limits of *SIGA's* reach are finally coming into focus.



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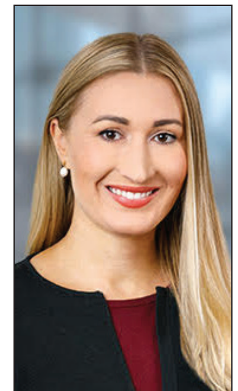

Kelsey Davis

In *Cambridge Capital v. Ruby Has*, a private equity firm sued a target company for breach of an implied duty to negotiate in good faith allegedly arising from a non-binding LOI for the potential purchase of half the target company. Cambridge Capital LLC alleged breach in two ways: substantially raising the price for the proposed acquisition after six months of negotiations, and breach of the exclusivity provision. Relying on *SIGA*, the firm sought to recover

tens of millions of dollars in "expectation damages," which was the profit it expected to earn had the deal gone through.

On summary judgment, the court (Hon. Lewis J. Liman) knocked out Cambridge's "expectation damages" under both New York and Delaware law. *Cambridge Capital v. Ruby Has*, F. Supp.3d, 2023 U.S. Dist. LEXIS 101866 (S.D.N.Y. June 2, 2023) (the decision). The court also dismissed the exclusivity claims. After a seven-day trial of the remaining issues, the jury rendered a defense verdict on the claim, finding that the non-binding LOI *did not* give rise to such a duty.

**Risk of Expectation Damages Under 'SIGA'—10 Years Later**

In *SIGA*, the Delaware Supreme Court affirmed an award of more than $100 million in expectation damages for breach of a duty to negotiate in good faith arising from a term sheet. The term sheet between SIGA Technologies Inc. and PharmAthene Inc. was "non-binding," but it was incorporated into a binding Merger Agreement and Bridge Loan Agreement. The court adopted New York law as to what constitutes a binding preliminary agreement giving rise to this duty; however, it deviated significantly from New York law on potential damages, and thus the ramifications of a breach.

New York law categorically prohibits expectation damages in this context. The Delaware Supreme Court, however, has doubled down on its contrary damages position despite criticism, reaffirming the potential availability of expectation damages on this claim. *See SIGA Technologies v. PharmAthene*, 132 A.3d 1108 (Del. 2015), and Justice Karen Valihura's dissent at 1139; *Cox Comm. v. T. Mobile US*, 273 A.3d 752, 760-61 (Del. 2022).

Although the *SIGA* decision itself was based on unusual facts and made clear that actual "bad faith" was required, the court also cited broad standards: that breach of this duty in any "[t]ype II preliminary agreement" could result in expectation damages, if "the trial judge makes a factual finding, supported by the record that the parties would have reached an agreement but for the defendant's bad faith negotiations."

*SIGA* further held that such agreements "bar a party from renouncing the deal, abandoning negotiations or insisting on conditions that do not conform to the preliminary agreement."

*SIGA* thus left open the possibility that a non-binding LOI could effectively be transformed into the final contract itself, subjecting the parties to lost profits damages if they did not negotiate in good faith, even though no final agreement was ever executed. *SIGA* sent shivers down the spines of company executives, who routinely use LOIs under Delaware law to provide the flexibility that *SIGA* seemed to eliminate.

Ten years later, however, not a single decision since *SIGA* has awarded expectation damages on this claim. *Cambridge Capital*, as well as another recent decision in Delaware federal court, are finally exposing *SIGA's* limits.

**Nonbinding Means Nonbinding**

The jury verdict and the decision in *Cambridge Capital* make clear that the LOI's language and the course of negotiations are key to the existence and scope of any duty. In *Cambridge Capital*, no duty existed. And even if it had existed, raising the price significantly as compared to the LOI did not necessarily suggest breach. *See* the decision at *100.

The court clarified the scope of the potential obligations under this duty, if it existed under this LOI. It said that that abandoning negotiations because of changed business conditions was not a breach where motivated by legitimate business concerns, and "acting in one's financial self-interest … in response to market changes, does not constitute bad faith." The court left for trial the question of whether the non-binding LOI at issue gave rise to a duty to negotiate in good faith. At trial, the jury found that it did not, ending the inquiry and resulting in a defense verdict.

Even if a duty had existed, the court showed *SIGA*'s limitations. At issue was Cambridge's claim that Ruby Has LLC allegedly demanded a price "more than two and a half times the price agreed to in the LOI." The court, however, found issues of fact on liability. If the parties acted "in their economic self-interest due to

changed conditions," as Cambridge itself did, there might be no breach. There were also issues of fact as to whether Ruby Has had previously terminated negotiations, and why.

Importantly, the court also questioned whether such a duty could even exist after the exclusivity period expired, as Ruby Has was then entitled to seek a higher price from other investors.

**No Expectation Damages—'Cambridge' and 'White Winston'**

The *Cambridge* court held that New York law applied, but nonetheless examined Delaware law and dismissed the claim for expectation damages under both.

It noted that "[c]ourts in Delaware have interpreted *SIGA* narrowly," and found the case distinguishable. While the damages in *SIGA* were reasonably foreseeable given the circumstances, that was not the case in *Cambridge* because, among other reasons, there was only a non-binding LOI and many key terms remained unresolved.

The court found no evidence that the parties would have reached an agreement but for the defendant's alleged bad faith negotiations.

Recently, a U.S. District Court for the District of Delaware distinguished *SIGA* and similarly rejected expectation damages. *White Winston Select Asset Funds v. Good Times Restaurants,* No. 1:19-CV-2092-SB, 2022 U.S. Dist. LEXIS 93670 (D. Del. May 25, 2022). There, the non-binding LOI memorialized "tentative assent" to potential terms, but like the *Cambridge* LOI, there was no obligation to complete the deal or be bound by those terms.

The court refused to permit "expectation damages" because the situation was distinct from *SIGA,* calling it a "type III agreement."

**Practical Implications**

The use of non-binding LOIs is extremely common in mergers and acquisitions. It allows the parties to explore a potential acquisition without committing to the ultimate transaction until they vet one another and fully negotiate the terms. The system works best when each side has the freedom to study the other, and negotiate deal terms in a way that allows them to take into account changing circumstances facing their businesses over the course of negotiations.

*SIGA* undermined this practice. It put parties acting under Delaware law at risk of extraordinary damages, even where no final deal was reached, if they were found to have negotiated in bad faith.

In *Cambridge Capital* and *White Winston*, judges and a jury have refused to find liability or award expectation damages on this claim where solely a non-binding LOI was at issue. These holdings show the narrow reach of *SIGA*, and align with common business practice. This precedent should help to constrain *SIGA* to its unique facts.

Parties can also do their part to avoid liability. Choice of law clauses can have real impact: New York law precludes any expectation damages, as opposed to Delaware law, which allows them in some circumstances. In addition, although the duty can in some instances be implied, parties should avoid including an express requirement to negotiate in good faith—a term that may, on its face, seem innocuous.

Parties should be careful to specify what terms are, and are not, binding, and to use proper language to limit liability under preliminary agreements.

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